

No. 11761

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

HERMAN H. HELBUSH and MONOGRAM MANUFACTURING
Co., a corporation,

Appellants,

vs.

DONALD H. FINKLE, doing business as WEDGELOCK COM-
PANY, *et al.*,

Appellees.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

Appellees' brief takes as its burden the task of diverting the Court's attention away from these unanswerable facts:

1. That the essence of the combination patented by claim 11 of Wallace patent in suit No. 2,365,787 is the overcoming of the old difficulty of assembling the two-pin type of sheet metal clamp, *by teaching the making of the clamp body in two parts: a main cylindrical body part and a separate, attachable end cap part*; and that although this problem had existed since 1933 [date of the first two-pin clamp patent, British patent 413,403, Ex. H-3], no one prior to Wallace disclosed, or even suggested, the idea of making the clamp body with a separate end cap. There is no evidence refuting this.

2. That, although the two-pin type clamp was invented first, the far less desirable one-pin or "Cleco" type clamp [exemplified by Ex. 13] remained in universal use until appellant Monogram introduced the Wallace clamp of patent 2,365,787 in 1941 [I, 78], at which time the Wallace clamp promptly entirely supplanted the "Cleco" type [I, 94] and reduced clamp costs by over 300%. There is no evidence refuting this.

3. That, although throughout all the years of using spring loaded sheet metal clamps, very serious personal injuries continued to be suffered by workmen due to the clamps flying apart and striking workmen, not until 1933, when Wallace invented the double safety stop feature of patent in suit 2,364,408, did any one overcome this hazard; and, when this Wallace clamp was introduced by appellant Monogram, it was promptly adopted universally. There is no evidence refuting this.

4. That the record fails to disclose any facts or conduct on the part of appellants justifying the award of attorneys' fees. Appellees' argument is based entirely upon statements of pretended facts contained in appellees' brief, which statements are erroneous and find no support whatsoever in the record.

The Trial Court Refused to Find the Patents in Suit to Be Limited to Including an End Wall in Addition to a Separate End Cap.

At pages 13-18 of their brief, appellees argue that both patents in suit are limited to a clamp having an end wall on the body as well as an end cap over that end wall, and that the Trial Court so found.

This is incorrect. The Trial Court expressly refused to so find or to so conclude. This refusal is shown by findings numbered 23 [I, 29], 34 [I, 31] and Conclusions of Law numbered 5 and 6 [I, 32], which were *proposed* by appellees but were *stricken* by the Trial Court.

Since the patent claims in issue do not include an end wall element, the patents could not properly be so limited unless it were shown that (a) an end wall in addition to an end cap was essential to operability, or (b) unless the prior art rendered such an interpretation essential to novelty. As pointed out in appellants' opening brief, neither is true and neither is established by any evidence.

Moreover, patent No. 2,364,408 could not by any possibility be so construed because it does not even show the clamp body as having an end wall. In the disclosure of that patent, a washer is inserted in the open end of the clamp body precisely as is done by appellees in constructing their accused clamp, Ex. 11.

It is to be noted that, in appellees' analysis of patent 2,365,787 appearing at page 13 of their brief, they carefully omit reference to the separate end cap feature of the patent in order to lend pertinence to the prior Rocroy and DeMooy patents, Exs. H-4 and H-7.

The Patents in Suit Are Improvement Patents.

Appellants have never contended otherwise than that the Wallace patents are only improvements over the prior patents before the Court. It is appellants' contention, however, that the Wallace patents teach highly important improvements which very materially advanced the art. In fact, the two-pin type clamp was only in the "paper patent" stage until the Wallace improvements of patent 2,365,787 made it practicable. It is to be noted that the statement appearing at the bottom of page 4 of appellees' brief, implying that the two-pin type clamps of the prior art of record were "used both in this country and abroad" prior to the recent war, is not only unsupported by the record, but is directly contrary thereto.

Appellees' Clamp Assembly Procedure Requires a Separate End Cap.

At page 15 of their brief, appellees argue that they devised a better assembly procedure than that of appellant Monogram. Whether that be true or not is immaterial, because the record shows that appellees had to use the Wallace separate end cap feature in order to carry out their assembly procedure.

Rocroy and DeMooy Fail to Show the Separate End Cap Feature.

At page 19 of their brief, appellees state that patent 2,365,787 shows nothing new over Rocroy or DeMooy. However, that statement completely overlooks the fact that neither Rocroy nor DeMooy, nor any other prior patent, shows the separate end cap feature of the Wallace patent.

Patent 2,364,408 Discloses a Valid Combination Invention.

At pages 23-24, appellees argue that patent 2,364,408 shows nothing more than an unpatentable collection of old elements. It is true that, individually, all the elements of this patent may be found in prior patents, but in those prior patents those elements do not cooperate to provide the Wallace double safety stop feature, the great utility of which is not questioned. The headed ends of the clamping pins 20, with the spreader between them, abut the end cap to provide one of the safety stops. If those heads should break off, the cooperating shoulders 16 and 17 provide the second safety stop to prevent the clamp from flying apart, and vice versa. And normally both those stops operate at the same time to share the spring load stresses.

The Muncie Gear Case Is Not Analogous.

At pages 25-26, appellees argue that claim 11 of patent 2,365,787 is invalid because the clamps had been in public use more than a year before the claim was inserted in the patent application, citing *Muncie Gear Works v. Outboard M. and Mfg. Co.*, as authority. The file wrapper of the patent, Ex. 3, shows that, from the date of filing, claims to the end wall feature were in the case. Claim 11 was inserted after termination of an interference proceeding in Wallace's favor, and was like other claims in the patent except that it omitted the obviously unnecessary end wall element.

The *Muncie Gear* case is not at all in point. In that case, the patentee, after prosecuting the application for several years upon one theory of what the invention was, and after its subject matter had been in public use for years, commenced prosecuting the application upon an entirely new and different theory, and claiming things never before mentioned in the case. Clearly those facts are not present here.

The Award of Attorneys' Fees Is Unjustified.

At pages 27-28, appellees attempt to justify the award of attorneys' fees, by advancing the entirely unsupported argument that appellants have harassed appellee Donald H. Finkle. It is unfair for appellants to make such statements in their brief when they are unsupported by the record.

Reference is there made to the case of *Monogram Mfg. Co. v. F. & H. Mfg. Co.*, 144 F. (2d) 412, stating that case to be prior litigation "between these parties." That prior case was against a copartnership, of which said Finkle was a member, and involved different patents.

Moreover, appellants did not institute that suit. Said copartnership sued for a declaratory judgment and appellees counterclaimed for infringement because that was a necessary counterclaim. There is no showing that the counterclaim was unjustified or in bad faith. The courts are the only tribunals to which a patentee may apply for an adjudication of his rights, and the bringing of a suit in good faith is not a wrong.

However, the record in the instant case does show that when appellant Monogram introduced the clamp of patent 2,365,787, Finkle copied it; and again when Monogram introduced the clamp of patent 2,364,408, Finkle copied that one also, which shows that Finkle has been a persistent infringer of appellants' patents. It is submitted, therefore, that if appellants were not fully justified in asking the Court to adjudicate their claim, then the patent statute has been reduced to a trap for well meaning inventors instead of being an incentive for the advancement of the arts and sciences as intended by the Constitution.

Conclusion.

It is respectfully submitted, therefore, that appellants have failed to show any valid reason why the appealed judgment should not be reversed.

Respectfully submitted,

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